IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 670 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? :

2. To be referred to the Reporter or not? :

3. Whether Their Lordships wish to see the fair copy of the judgement? :

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? :

5. Whether it is to be circulated to the Civil Judge? :

H K DHRUVA

Versus

UNION OF INDIA

Appearance:

PARTY-IN-PERSON for Petitioner

MR JC SHETH for Respondent No. 1

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 10/04/2001

C.A.V. JUDGEMENT

1. Shri H.K.Dhruva, applicant party-in-person has filed this Civil Revision Application under Section 115 of the Code of Civil Procedure challenging the judgment

and order dated 6th November, 1989, passed by the learned Judge, City Civil Court, Court No.10, Ahmedabad, whereby Hon'ble Court has been pleased to dismiss the Civil Miscellaneous Application No.385 of 1986 alongwith two other Civil Miscellaneous Applications. The said Civil Miscellaneous Application No.385/1986 was filed by the applicant under Section 8 and 9 of the Arbitration Act, 1940 (to be referred to hereinafter as `the Act') for an appointment of an Arbitrator. That application was filed for the purpose of seeking reference to appoint the two persons as Joint Arbitrators as the terms of notice of applicant under Section 8 of the Act or any other persons of Hon'ble Court's choice to work as Joint Arbitrators for resolving the disputes of the parties.

2. The facts giving rise to this application are as under:-

2.1 The applicant is a Contractor and carries on his business of contracts on and from his office situated at A-2, Kahan Nagar, 7-Panchnath Plots, Rajkot. The Union of India through The Western Railway, through General Manager, Western Railway, Churchgate, Bombay invited the tenders for the work of construction of Type Staff Quarters at Rajkot, Yard Rajkot, in connection with convertion of project. The applicant submitted his tender for the same alongwith other tenderers. The Engineer-in-Chief, Western Railway, Ahmedabad, accepted the tender of the applicant at 479% above the Schedule of Rates applicable to Rajkot Division on 19th December, 1980, and in pursuance to the said acceptance a Contract Agreement being No.RJT/W/CA/436 dated 18th January, 1981 was executed between the applicant and the opponents. As per the express condition of the Contract the work was to be completed on or before 18th August, 1981, but the same was not completed within the stipulated time limit, hence, the difference and dispute arose between the parties. It was the contention of applicant that work was delayed due to the fault of the opponents, the applicant completed all the works allotted to him thoroughly and to the entire satisfaction of the opponents and handed over the same to the opponents on completion. It was contended that the opponents failed to make correct, proper, full and valid payments to the applicant for all the works carried out by him as per their directions. The applicant demanded the payment of his dues from the opponents, but the opponents refused to make the payment. As per Western Railway's printed booklet `General Conditions of Contract' forms the part of the Contract and Clause No.62 which provides matters finally determined by the Railway and Clause 62 & 63

which provides demand for arbitration.

"Clause.62:- All disputes or differences of any kind whatever arising out of or in connection with the contract, whether during the progress of the works or after their completion and whether before or after the determination of the contract shall be referred by the Contractor to the Railway and the Railway shall within a reasonable time after their presentation make and notify decisions thereon in writing. The decisions, directions and certificates with respect to any matters decision of which is specially provided for by these conditions, given and made by the Railway, or by the Engineer on behalf of the Railway, which matters are referred to hereinafter as Excepted Matters shall be final and binding upon the Contractor and shall not be set aside or be attempted to be set aside on account of any informality, omission, delay or error in proceeding in or about the same or on any other ground or for any other reason and shall be without Appeal."

"Clause.63:- If the Contractor be dissatisfied with the decision of the Railway, on any matter in question, dispute or difference, on any account or as to the withholding by the Railway of any certificates to which the Contractor may claim to be entitled to or if the Railway fails to make a decision within a reasonable time, then and in any such case but except in any of the Excepted matters referred to in Clause 62 of these conditions the Contractor may within 10 days of the receipt of the communication of such decision or after the expiry of the reasonable time as the case may be, demand in writing that such matter in question, dispute or difference be referred to arbitration. Such demand for arbitration shall be delivered to the Railway by the Contractor and shall specify the matters which are in question, dispute or difference and only such dispute or difference of which the demand has been made and no other shall be referred to arbitration.

Obligation during pendency of arbitration:-

(2) Work under the contract shall, unless otherwise directed by the Engineer, continue during the arbitration proceedings, and no payment due or payable by the Railway shall be withheld on account of such proceedings provided however it shall be open for the arbitrator or arbitrators to consider and decide whether or not such work should continue during arbitration proceedings.

(3) (a) Matters in question, dispute or difference Arbitration to be arbitrated upon shall be referred for decision to:

I. A sole Arbitrator who shall be a Gazetted Railway Officer in cases where the claim in question is below Rs.50,000/- and in cases where the issues involved are not of a complicated nature. The Gazetted Railway Officer shall be the sole judge to decide whether or not the issues involved are of a complicated nature.

II. Two Arbitrators who shall be Gazetted Railway Officers of equal status to be appointed in the manner laid down in Clause (3)(b) for all claims of Rs.50,000/and above, and for all claims irrespective of the amount or value of such claims if the issues involved are of a complicated nature. The Gazetted Railway Officer shall be the sole judge to decide whether the issues are of a complicated nature or not. In the event of the two Arbitrators being divided in their opinions the matter under dispute will be referred to an Umpire to be appointed in the manner laid down in Clause (3)(b) for his decision.

III. Added (C.S. No.63 dt. 27.5.1975) "The Arbitrator/Arbitrators/Umpire so appointed, as the case may be, shall give the award on all matters referred to Arbitration indicating therein breakup of the sums awarded separately on each individual item of dispute."

(b) For the purpose of appointing two arbitrator as referred to in sub-clause (a)(ii) above, the Railway will send a panel of more than three names of officers of the appropriate status of different departments of the Railway to the contractor, who will be asked to suggest a panel

of three names out of the list so sent by the Railway. The Railway Officer will appoint one arbitrator out of this panel as the contractor's nominee, and then appoint a second arbitrator or equal status as the Railway's nominee either from the panel or from outside the panel ensuring that one of the two arbitrators so nominated is invariably from the Accounts Department. Before entering into reference, the two Arbitrators shall nominate an Umpire to whom the case will be referred in the event of any difference between the two Arbitrators.

(c) The Arbitrator or Arbitrators or the Umpire shall have power to call for such evidence by way of affidavits or otherwise as the Arbitrator or arbitrators or Umpire shall think proper, and it shall be the duty of the parties hereto to do or cause to be done all such things as may be necessary to enable the Arbitrator or Arbitrators or Umpire to make the award without any delay.

(d) It will be no objection that the person appointed as Arbitrator, Arbitrators, Umpire are Government servants and that in the course of their duties as Government servants they have expressed views on all or any of the matters in dispute.

Subject as aforesaid, Arbitration Act 1940 and the Rules thereunder and any statutory modification thereof shall apply to the Arbitration proceedings under this clause.

2.2 Facts regarding First Claim:-

The applicant submits that Clauses 62 and 63 are Arbitration Clauses. The disputes and differences arose between the applicant and the opponents out of work contract awarded to the applicant pertaining to construction of type Staff Quarters at Rajkot which was awarded on 18th January, 1981. The applicant had preferred the claims on the basis of notice dated 28th October, 1982 which was pertaining exclusively to the return of security deposit alongwith the interest. On 10th June, 1982 the contract was rescinded as alleged. The railway refused the said claim on 25th February, 1983. The petitioner-claimant thereafter filed Civil Miscellaneous Application 459/84 on 18th July, 1984. The City Civil Court by judgement dated 20.12.1984 ordered to appoint arbitrator under Section 8 and 9 of the

Arbitration Act for the purpose of settling dispute about the security deposit. The said arbitrator (Shri. T.B. Joshi) was appointed on 4th December, 1985 by Railway, who prepared and published his award on 30th August, 1988 whereby the applicant was awarded Rs.56,640/and the said awarded amount was realised by the applicant, after City Civil Court, Ahmedabad decreed the award in Civil Miscellaneous Application No. 1121 & 1159 of 1988.

Claim regarding second demand

2.3. The applicant submitted that since the remaining work was completed by the opponent departmentally the final bill pertaining to the said work in question was prepared subsequently. The petitioner was constrained to address the notices dated 3rd February, 1984, 3rd March, 1984 and 14th April, 1984 under the relevant clauses of Clauses 62 and 63 read with Section 8(1) of the Arbitration Act to the Railway. The applicant had claimed in all an amount of Rs.12,33,667/- pertaining to the recovery on account of damages and other losses including the amount of work done, which was so far not paid etc. The railway refused the said demand on 07.05.1984. The applicant again made a request cum reminder regarding second demand on 23.07.1984. The railway again failed to pay the said claim on ground that the same are imaginary and not tenable and time barred by the communication dated 12.09.1985 and 27.09.1985. The petitioner/claimant again requested the railway to entertain their reference after personally contacting officers at Bombay and Ahmedabad. Thereafter, another reminder was given by the claimant on 23.10.1985 but the railway took no action. Thereafter, being aggrieved and dissatisfied with the said action claimant filed Miscellaneous Civil Application No.385/1986 before the City Civil Court at Ahmedabad for purpose of settlement of other disputes which had arisen pertaining to other works awarded to the applicant by the opponent.

2.4 The learned Judge of the City Civil Court, Court No.2, Ahmedabad, by his judgment and order dated 16th October, 1989 was pleased to reject the said application. The Hon'ble Court held that application was liable to be rejected on the ground that on the earlier occasion disputes arose on account of failure to handover un-interrepted and exclusive possession of the site, not handing over of the plans and drawings alongwith the work order as per express provision and terms of the contract, failure to give direction of point and manner of carrying out various parts of the work, failure to make full and regular payments of the work carried out, failure to

supply materials, failure to take full and correct payment of the work etc. The Court held that the present claim has arisen from the same cause of action and so they are barred by the provision of Order 2 Rule 2 of Civil Procedure Code.

3. Before I consider the rival contentions, I may refer to the statutory provisions of the Arbitration Act. The Arbitration Act is a statute which provides for the outser of the jurisdiction of a Court.

Sec.2 Cl(a) provides definition of arbitration agreement means a written agreement submit present or future differences to arbitration, whether an arbitrator is named therein or not.

Clause (e) provides reference to arbitration:

Sec.5 provides authority of appointed arbitrator or umpire irrevocable except by leave of court.

Sec.8 provides power of court to appoint arbitrator or umpire.

(1) In any of the following cases:

(a) Where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments; or

(b) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy; or

(c) where the parties or the arbitrators are required to appoint an umpire and do not appoint him;

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or

appointments or in supplying the vacancy.

(2) If the appointment is not made within fifteen clear days after service of the said notice, the Court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties.

Sec.9 provides power to party to appoint new arbitrator or in certain cases a sole arbitrator.

Where an arbitration agreement provides that a reference shall be to two arbitrators, one to be appointed by each party, then, unless a different intention is expressed in the agreement -

(a) if either of the appointed arbitrators neglects or refuses to act, or is incapable of acting or dies, the party who appointed him may appoint a new arbitrator in his place;

(b) if one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for fifteen clear days after the service by the other party of a notice in writing to make the appointment, such other party having appointed his arbitrator before giving the notice, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference and his award shall be binding on both parties as if he had been appointed by consent:

Provided that the Court may set aside any appointment as sole arbitrator made under clause (b) and either, on sufficient cause being shown, allow further time to the defaulting party to appoint an arbitrator or pass such other order as it thinks fit.

Chapter III Arbitration with intervention of a court where there is no suit pending. Sec.20 provides for application to file in Court arbitration agreement.

Sec.37 provides all the provisions of the Indian Limitation Act, 1908 shall apply to arbitrations as they apply to the proceedings in Court.

Sec.37(4) provides where the terms of an agreement to refer future differences to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a difference arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

4. The learned Judge has held that as regards Civil Misc.Appln.No.385/86 in respect of the said subject matter Civil Miscellaneous Application No.459/1984 was filed earlier which is produced at Exh.22/1 and 22/2. It was held by the learned Judge that dispute raised by earlier demand and the present application are verbatim the same. After examining the previous application No.459/83 with the present application No.385/86, the learned Judge has held that the dispute raised in the present application also pertaining to the same cause of action which were raised in the earlier application and therefore application was barred from raising same in the present application. The learned Judge after comparing the contents of the demand notice for fresh claims in present application has held that same was barred on the same cause of action and hence they are barred by Order 2 Rule 2 of Civil Procedure Code.

ORDER 2 RULE 2

4.1. Order 2 Rule 2 of the Civil Procedure Code reads as follows:

"Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court."

"Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he sh[all not afterwards sue in respect of the portion so omitted or relinquished."

4.2. The applicant has relied upon the judgment of the Hon'ble Supreme Court in the case of The State of Madhya Pradesh Vs. The State of Maharashtra and others reported in AIR 1977 S.C. 1466. In Para 25 of the said judgment the Hon'ble Supreme Court has observed as under:

"The contention of Madhya Pradesh cannot be accepted. The plaintiff will be barred under Order 2 Rule 2 of the Code of Civil Procedure only when he omits to sue for or relinquishes the claim in a suit with knowledge that he has a right to sue for that relief. It will not be correct to say that while the decision of the Judicial Committee in Lall's case (supra) was holding the field the plaintiff could be said to know that he was yet entitled to make a claim for arrears of salary. On the contrary, it will be correct to say that he knew that he was not entitled to make such a claim. If at the date of the former suit the plaintiff is not aware of the right on which he insists in the latter suit the plaintiff cannot be said to be disentitled to the relief in the latter suit. The reason is that at the date of the former suit the plaintiff is not aware of the right on which he insists in the subsequent suit. A right which a litigant does not know that he possesses or a right which is not in existence at the time of the first suit can hardly he regarded as a "portion of his claim" within the meaning of O.2 R. 2 of the Code of the Civil Procedure."

4.3. He has also relied upon the judgment of the Hon'ble Supreme Court in the case of Deva Ram and another Vs. Ishwar Chand and another reported in AIR 1996 Supreme Court 378. In Para 17 and 18 the Hon'ble Supreme Court has observed as under:

"We have already noticed in the earlier part of the judgment that the previous suit was filed for recovery of a sum of Rs.6300/- as sale price of the land in suit which was dismissed with the finding that the document on which the suit was filed was not a sale deed but was a mere agreement for sale and, therefore, the amount in question could not be recovered as sale price.

That document, thus, constituted the basis of the suit. The subsequent suit was brought by the respondents for recovery of possession on the ground that they were the owners of the land in suit and were consequently entitled to recover its possession. The cause of action in the subsequent suit was, therefore, entirely different. Since the previous suit was for recovery of sale price, the respondents could not possibly have claimed the relief of possession on the basis of title as title in that suit had been pleaded by them to have been transferred to the defendants (appellants). The essential requirement for the applicability of Order 2 Rule 2, namely, the identity of causes of action in the previous suit and the subsequent suit was not established. Consequently, the District Judge as also the High Court were correct in rejecting the plea raised by the appellants with regard to Order 2 Rule 2 of the Civil Procedure Code."

4.4. The party-in-person contended that after raising dispute and after demanding arbitration a claimant can raise fresh claim till the arbitrator gave his award. He further submitted that this principle should have been properly applied by the Court to the latter dispute of the present application. He further submitted that the applicant originally preferred claim on 28th October,1982 the court ordered for appointing arbitrator on 20th December, 1984 and Railway appointed arbitrator on 4th December, 1985. Before that, applicant issued a fresh notice on 19th November, 1983, for raising additional claim. Thereafter, arbitrator has made and declared award on 30th August, 1988. He submitted that in this case cause of action for the original claim dated 28th October, 1982 and the cause of action for application dated 3rd February, 1984, were different and, therefore, fresh notice raising additional claim can be issued.

4.5. The applicant party-in-person contented that the reasonings of the learned Judge is contrary to and inconsistent with the judgment of this Court in the case of Kothari & Associates Vs. State of Gujarat reported in 1986(1) GLR 593. In Para 10 of the said judgment, the learned Judge has observed as under:

"Although I am unable to agree with the latter part of the above quotation, it is clear that the provisions of Order 2, Rule 2 is a rule of completest wisdom. If it were to attach any indiscriminate and indeed incalculable penalty to

a condition difficult to define, it would not be rule of completest wisdom. The rule is merely to the effect that a person shall include whole of his claim in respect to the same cause of action and omission to sue in respect of any portion of his claim would be barred. This is a salutary provision which prevents multiplicity of proceedings and avoids the vice of splitting up the cause of action as observed by the learned Judge in the case of Jiwnani Engineering Works. This principle ought to apply with greater force to the arbitration proceeding which is meant for speedy disposal of disputes and if successive disputes on the same cause of action could be raised that would defeat the very objective of arbitration proceedings. The claim before the arbitrator is clearly in the nature of a suit and instead of a Civil Court adjudicating upon the claim a separate form of arbitrator adjudicates upon the same claim. Therefore, for the purpose of Order 2 Rule 2 and for the principles of constructive res judicata and other principles based on sound public policy, ought to apply naturally to arbitration proceedings. I am in respectful and complete agreement with the reasoning and conclusion of the learned Judge in the case of Jiwnani Engineering Works."

In Para 15 of the said judgment, the learned Judge has observed as under:

"However, it is not possible to uphold the award of the learned trial Judge with respect to items Nos. 2,3 and 5. It is true that these questions and claims could have been made by the applicant at the time of his previous applications and the provisions of Order 2 Rule 3 enable the plaintiff to include and unite in the same claim several causes of action against the same defendant. However this is merely an enabling provision, and in respect of different causes of action the person has liberty to unite or not to unite the same in one application and if he thinks not to unite claims in respect of different causes of action, the bar of O.2, R.2 would not be attracted. The person is free to restrict his claim in respect of one cause of action in one action and to reserve his right to make a different and separate claim in respect of claims under other causes of action. It is not the omission to sue or claim but it is the right

given to a party to make a separate and independent claim in respect of separate and independent causes of action. Therefore the position is that the provisions and principle underlying O. 2 R. 2 are not attracted to the claims made under items Nos.2, 3, and 5 of the present application, and this is required to be referred to the arbitrator and to that extent the order of the learned trial Judge deserves to be quashed and reversed."

4.6. The applicant has also relied upon the judgment reported in AIR 1985 Delhi 132 in the case of Delhi Development Authority, New Delhi Vs. M/s. Alkarma, New Delhi. The Division Bench of Delhi High Court (Coram: M/s. Prakash Narain, C.J. and B.N.Kirpal, J. as he was then) in para 16 has observed as under:

"In our opinion, the provisions of O.2 R.2 would apply, as we have already stated hereinabove, if the request for referring more disputes to arbitration is made after the making of the award. Once an award has been made, a party cannot be permitted to raise more disputes which he/it could and ought to have raised earlier. [Where, however, an award has not been made, it is open to a claimant to ask for more disputes to be referred to arbitration provided the arbitration proceedings are not yet over. In such an event, if the authority competent to appoint an arbitrator and to refer the disputes, fails to do so, the Court has the jurisdiction to order the filing of the arbitration agreement and to direct the Engineer Member to refer the disputes to arbitration."

5. Mr.J.C.Sheth, learned Counsel for the Opponent-Railway submitted that applicant had filed Civil Miscellaneous Application .No.459/84 before this Court earlier. He has further submitted that as per Court's order dtd.20.12.1984, Shri T.B. Joshi was appointed as Sole Arbitrator by Railway on 4.12.1985. The Sole Arbitrator gave his award on 30th August, 1988 . He has also submitted when contract is cancelled a cause of action arose. So the applicant is bound to raise all claimed at that time. So the 2nd claim raised by the claimant is barred by Order 2 Rule 2.

6. As against this, applicant Contractor stated that the award of Rs.56,640/- in favour of applicant does not relate to the claim which has been sought in the notice

dated 03.02.1984.

6.1 Relying upon the aforesaid authorities, applicant has submitted that (a) Once an award has been made, a party cannot be permitted to raise more disputes which he/it could and ought to have raised earlier, (b) Where, however, an award has not been made, it is open to a claimant to ask more disputes to be referred to arbitration provided the arbitration proceedings are not yet over, (c) In such an event, if the authority competent to appoint an arbitrator and to refer the disputes, fails to do so, the Court has the jurisdiction to order the filing of the of the arbitration agreement. He therefore submitted that after raising dispute and after demanding arbitration a claimant can claim more disputes to refer to the arbitration before the award has been made. This principle should have been properly applied by the Court to the latter dispute of the present application.

7. In view of the aforesaid discussion and on going through the contention raised by the applicant as well as railway, I am of the view that in this case Order 2 Rule 2 of the CPC does not apply and the applicant is entitled to raise second claim which were not subject matter of earlier claims and to that extent there were different cause of action arise in contractor's claim and therefore the findings of the learned Judge that the claim of the contractor is barred by Order 2 Rule 2 of the CPC is illegal and liable to be set aside.

8. In my view, a perusal of Order 2 Rule 2 would clearly reveal that it applies to cases where applicant omits to pursue a portion of the cause of action on which the suit is based either by relinquishing the cause of action or by omitting part of it. It has no application to cases where the applicant bases his suit on separate and distinct cause of action. In such cases, it is always open to the applicant to file a fresh suit on the basis of a distinct cause of action which he may have so relinquished. In this case, when applicant raised first claim the applicant was not aware about the right on which he insist in the latter claim and, therefore, the applicant cannot be said to be disentitled to the relief in the latter claim. The applicant did not know that he possesses a right which is not in existence at the time of first claim, he can hardly have relinquished as regarded as portion of his claim within the meaning of Order 2 Rule 2 of Civil Procedure Code, actually applicant raised Second Claim much before Railway appointed Shri. T.B. Joshi on 04.12.1985, who declared

his award on 30.08.1988.

The appointment of Arbitrator by the Court

9. Party-in-person Shri Dhruva has stated in this case first demand was made by claimant somewhere in 1982; the second demand was raised on 3rd February, 1984. The Railway refused the second demand only on 27th September, 1985. The petitioner filed Miscellaneous Civil Application No.459/1984 on 18th February, 1984, under Secs.8 and 9 of the Arbitration Act for the purpose of settling the dispute. Shri T.B. Joshi has been appointed as a Sole Arbitrator who has published award on first claim on 30th August, 1988. He stated that with a view to see that he has made further claims and thereafter as the said claim were refused he filed Misc. Civil Appln.No.385 of 1986 before the City Civil Court at Ahmedabad, and other two Misc.Civil Applns. No.384/86 and 386/86 filed in the same Court for the purpose of settlement and other disputes which had arisen pertaining to other works related to the applicant. He stated that the learned City Civil Judge by its common judgment dated 6th November, 1989, pleased to reject the said applications. Being aggrieved and dissatisfied with the said judgment of the learned City Civil Judge, Ahmedabad, he filed Civil Revision Appln.No.670/90. In view of the above background of the case, party-in-person has submitted that, as Railway refused to appoint arbitrator first under Civil Misc. Appln.No.459/1984 and then in Civil Misc.Appln.No.385/86, the respondent-Union of India, through Railway, General Manager has forfeited his right now to appoint as a fresh arbitrator. In view of this, this Court can appoint arbitrator as per the provisions of the Arbitration Act. In support of the same he has relied upon the judgment of the Hon'ble Apex Court in the case of State of West Bengal Vs. National Builders reported in AIR 1994 S.C. 200. In para 6 on page 204 the Hon'ble Apex Court observed as under:

> "Basis for assuming such jurisdiction, as stated earlier, is that the clause is rendered inoperative. Where the agreement provides for appointment of a specific person wither by name or by designation and that person refuses to act then the question of appointing him again cannot arise. Refusal by such a person results in the agreement clause ceasing to operate. When two parties agree for appointment of `A' or `B' by name or designation and the person so named refuses to act then the agreement shall be deemed

to have exhausted itself. The person so named having refused to act he cannot be asked again to arbitrate. That would be contrary to the very basis of arbitration that no one can be forced to act against his free will. It would also be contrary to the agreement and if there is no agreement to appoint another person, the only remedy is to approach the Court to exercise its statutory power and appoint another arbitrator."

10. He submitted that in first dispute, General Manager, Western Railway refused to appoint arbitrator. In the second dispute also railway refused to appoint arbitrator and again when the matter was brought before the Court, the railway again refused to appoint arbitrator. In view of the aforesaid principle laid down by the Hon'ble Supreme Court, he has relied upon another judgment in the case of G.Ramachandra Reddy & Co., Vs. Chief Engineer, Madras Zone, Military Engineering Service reported in AIR 1994 S.C. 2381. He, therefore, relied upon the aforesaid authority and submitted that in the interest of justice and in the interest of speedy trial, it is advisable if this second dispute raised in Civil Miscellaneous Application .No.385/1986 are referred to the same arbitrator who finalised the first dispute in the same contract agreement. The first dispute was referred to arbitrator, who was the Senior Division Engineer Shri T.B. Joshi at the relevant time, now he is retired he would be able to finalise the matter in its statutory four months period or even earlier as he would attend full time to arbitration.

11. In the facts and circumstances of the case and in view of the foregoing discussions made hereinabove, this Civil Revision Application deserves to be allowed and it is accordingly allowed. The judgment and order dated 6th November, 1989, passed by the learned City Civil Judge, Ahmedabad, in Civil Misc. Appln.No.385/86 is quashed and set aside. I, therefore, appoint Shri T.B. Joshi, Retired Deputy Chief Engineer, Western Railway, Vadodara, as arbitrator to resolve the disputes raised in Civil Misc. Application No.385/86. If by any reason, if Shri. T.B. Joshi, (Retd.) Deputy Chief Engineer, Western Railway, Vadodara is not available to act as arbitrator then alternatively Shri.H.G. Patel, Retd. Deputy. Chief Engineer, Churchgate, may also be appointed as arbitrator. I hope and trust that the arbitrator so appointed, should complete the arbitration as early as possible, within 4 (four) months from the date of receipt of writ of this Court. The applicant and respondents are requested to contact T.B. Joshi and submit to him their claims and replies thereto within first two months and

parties should provide fees to Shri. T.B. Joshi in equal share. A copy of this order be served to Western Railway, who in turn, to serve on Shri.T.B. Joshi However, if Shr

refuses then Railway should request Shri H.G. Patel, who is appointed as arbitrator when Mr.Joshi is not able to do the work. Rule is made absolute to the aforesaid extent. Mr. Dhurva, also allowed service to Shri. T.B. Joshi.

(K.M. MEHTA,J.)

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